

The City of Fort Wayne (the “City”) appeals an order from the Indiana Utility Regulatory Commission (the “IURC”) terminating an investigation of Utility Center, Inc. (“Utility Center”). The City argues that the IURC erred when it issued the order because it was not supported by findings and substantial evidence and was contrary to law. Utility Center has filed a motion to dismiss this appeal contending that the City did not file a timely notice of appeal under the appellate rules.

We dismiss.

FACTS AND PROCEDURAL HISTORY

Utility Center provides sewer and water utility service in and around the City. Because of environmental, service quality, and other operational issues concerning Utility Center, the IURC issued an order on June 3, 1998 to begin an investigation of Utility Center. The order stated that numerous complaints had been received regarding Utility Center’s operation of its water and sewage treatment facilities and that public interest had been affected by the inadequate service provided by Utility Center. The IURC permitted the City and the Allen County Regional Water and Sewer District to intervene in the proceeding.

On February 25, 1999, after an evidentiary hearing, the IURC issued an interim order that: (1) found that there were significant problems with Utility Center’s water and sewer systems; (2) required Utility Center to take certain remedial actions, which included purchasing water from the City when needed; and (3) required Utility Center to file monthly reports detailing Utility Center’s remedial efforts. *Appellant’s App.* at 1-42. Following the issuance of this interim order, the parties to the investigation entered into negotiations to develop a plan to resolve the problems with Utility Center’s systems. A settlement

agreement was reached among Utility Center, the Office of Utility Consumer Counselor, the IURC staff, the City, and the Allen County Regional Water and Sewer District and was filed with the IURC on October 25, 1999. A plan of action to improve Utility Center's systems (the "Action Plan") was attached to and incorporated into the settlement agreement. The Action Plan required Utility Center to complete thirty-six proposed Action Items. On December 1, 1999, after conducting another evidentiary hearing, the IURC approved the settlement agreement and Action Plan with no changes.

After December 1999, Utility Center filed monthly reports and other information required by the settlement agreement. These monthly reports contained information identifying Action Items and the progress on the completion of these items. After various conferences between the parties failed to resolve the pending issues regarding the investigation, Utility Center requested the IURC to establish procedures and a schedule to allow the IURC to approve Utility Center's Master Plan and to set an evidentiary hearing on the issue of how the investigation might be brought to a conclusion. The IURC set a schedule for filing testimony and other evidence and set a hearing for May 24, 2005.

At the conclusion of the hearing, the IURC issued a final order terminating the investigation of Utility Center. In this order, the IURC noted that both the member of the Office of Utility Consumer Counselor and the member of the IURC staff who presented testimony agreed that the investigation should be closed. The final order stated that this testimony demonstrated that Utility Center had made extensive improvements to its facilities, that it had completed or substantially completed all of items in the Action Plan, and that the quality of its service had improved since the commencement of the investigation. *Id.* at 99-

100. On September 20, 2005, the City filed a petition for rehearing and reconsideration requesting that the IURC reconsider the final order because the evidence did not support the determination that the investigation should be closed. The City's petition for rehearing was denied on November 22, 2005, and the City filed its notice of appeal on December 21, 2005.

DISCUSSION AND DECISION

Utility Center argues that this appeal should be dismissed because the City's notice of appeal was untimely filed. Although our motions panel has already ruled on this issue, Utility Center is not precluded from presenting this argument to us. *Smith v. Deem*, 834 N.E.2d 1100, 1103 (Ind. Ct. App. 2005), *trans. denied*. "We are reluctant to overrule orders decided by the motions panel, but we are not precluded from doing so." *Id.* "It is well established that we may reconsider a ruling by the motions panel"; however, we will decline to do so in the absence of clear authority establishing that the motions panel erred as a matter of law. *Cincinnati Ins. Co. v. Young*, 852 N.E.2d 8, 12 (Ind. Ct. App. 2006); *Oxford Fin. Group, Ltd. v. Evans*, 795 N.E.2d 1135, 1141 (Ind. Ct. App. 2003).

Utility Center argues that Indiana Appellate Rule 9(A)(3) does not allow for an extension of the thirty-day time limit for filing a notice of appeal when a motion to reconsider is filed. It contends that because the City waited to file its notice of appeal until December 21, 2005, which was nearly four months after the date of the IURC's final order, the City failed to file a timely notice of appeal. Utility Center relies on a recent decision by this court, *Citizens Indus. Group v. Heartland Gas Pipeline, LLC*, 856 N.E.2d 734 (Ind. Ct. App. 2006), *trans. denied*.

In *Citizens*, the unsuccessful party before the IURC petitioned the commission to reconsider its adverse ruling under Ind. Admin. Code tit. 170, r. 1-1.1-22.¹ *Id.* at 736. The unsuccessful party did not file its notice of appeal within thirty days of the IURC’s final order, and instead, relied on its motion to reconsider to toll the time for filing its notice of appeal. *Id.* Although Appellate Rule 9(A)(1) allows for the tolling of the thirty-day time limit to file a notice of appeal when a party files a motion to correct error,² Appellate Rule 9(A)(3), which governs appeals from administrative agency decisions does not explicitly allow such a tolling of the time limit. It states:

A judicial review proceeding taken directly to the Court of Appeals from an order, ruling, or decision of an Administrative Agency is commenced by filing a Notice of Appeal with the Administrative Agency within thirty (30) days after the date of the order, ruling, or decision, notwithstanding any statute to the contrary.

Because “the plain language of Appellate Rule 9(A)(3) clearly and unequivocally states that a party appealing from an administrative agency’s order must file a notice of appeal ‘within thirty (30) days after the date of the order, ruling, or decision, notwithstanding any statute to the contrary,’” this court concluded that in order to comply with the appellate rules, an appellant must file its notice of appeal within thirty days of the date when the agency’s final

¹ Ind. Admin. Code tit. 170, r. 1-1.1-22 provides that “[f]ollowing a final order, any party to a proceeding may file with the commission and serve upon all parties of record a petition for rehearing and reconsideration within twenty (20) days of the entry of the final order, unless an applicable statute shall specifically fix a longer period.”

² Indiana Appellate Rule 9(A)(1) states, in pertinent part:

A party initiates an appeal by filing a Notice of Appeal with the trial court clerk within thirty (30) days after the entry of a Final Judgment. However, if any party filed a timely motion to correct error, a Notice of Appeal must be filed within thirty (30) days after the court’s ruling on such motion, or thirty (30) days after the motion is deemed denied under Trial Rule 53.3, whichever occurs first.

order is issued, regardless of whether the party has a petition to reconsider pending before the administrative agency. *Citizens*, 856 N.E.2d at 738.

The circumstances in the present case are identical to those in the *Citizens* case. Here, the IURC entered its final order terminating the investigation of Utility Center on August 31, 2005. The City then filed a petition for rehearing and reconsideration on September 20, 2005. The City did not file its notice of appeal until December 21, 2005, which was almost four months after the IURC had issued its final order. The City's notice of appeal was therefore not timely filed under Appellate Rule 9(A)(3), which requires that such a notice be filed within thirty days after the date of the order, ruling, or decision being appealed. The failure to file a timely notice of appeal requires dismissal of an appeal. Ind. Appellate Rule 9(A)(5); *Peals v. County of Vigo*, 783 N.E.2d 781, 783-84 (Ind. Ct App. 2003). We therefore conclude that the City has forfeited its right to appeal.

Dismissed.

SHARPNACK, J., and MATHIAS, J., concur.